

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BURNIS HERRING,	)	CASE NO. C09-1637-JLR
	)	
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
WASHINGTON STATE PENITENTIARY,	)	
et al.,	)	
	)	
Respondents.	)	
_____	)	

Petitioner Burnis Herring, proceeding *pro se* and *in forma pauperis*, filed a 28 U.S.C. § 2254 habeas corpus petition. (Dkt. 1-2.) On December 8, 2009, the Court declined to serve his petition because Mr. Herring sought to amend his original petition and also because he had not named a proper respondent. (Dkt. 11, at 1-2.) The Court did, however, grant Mr. Herring leave to amend his petition within thirty days, noting that the amended petition would serve as a complete substitution for the original petition and that failure to file an amended petition could lead to a recommendation of dismissal. (*Id.* at 2.) On January 29, 2010, the Court ordered him to show cause within thirty days why his habeas petition should not be dismissed for failure to file an amended petition by the deadline to do so. (Dkt. 12, at 1-2.) Mr. Herring has filed no

01 response to the order to show cause.

02       The Court recommends DISMISSING the habeas petition without prejudice for Mr.  
03 Herring's failure to comply with two court orders (Dkts. 11, 12) and his failure to prosecute.  
04 In determining whether to dismiss a claim for failure to comply with a court order or for failure  
05 to prosecute, the Court weighs the following factors: (1) the public's interest in expeditious  
06 resolution of the litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to  
07 respondents; 94) the availability of less drastic alternatives; and (5) the public policy favoring  
08 disposition of cases on their merits. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir.  
09 1992). All five factors weigh in favor if dismissal without prejudice.

10       The Court afforded Mr. Herring two opportunities and more than 60 days to amend his  
11 habeas petition, which he himself sought to do. (*See* Dkt. 7.) He has failed to respond in any  
12 way. In addition, Mr. Herring's failure to name his custodian as respondent deprives this  
13 Court of personal jurisdiction. *Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th Cir.  
14 1994) (order). Thus, (1) the public's interest in expeditious resolution of litigation favors  
15 dismissal; (2) the Court's need to manage its docket favors dismissal; (3) the risk of prejudice to  
16 respondents favors dismissal because improper respondents have been named; (4) there is no  
17 less drastic alternative to dismissal without prejudice because there are no assurances that Mr.  
18 Herring will respond to additional court orders; and (5) the public policy favoring disposition of  
19 cases on the merits indicates that a habeas petition should proceed only against proper  
20 respondents. If, however, Mr. Herring chooses to file an amended complaint in lieu of  
21 objections to this Report and Recommendation, the Court would recommend referral back to  
22 the undersigned judge so that this case may proceed on the merits.

01 If the district court adopts the report and recommendation, it must determine whether a  
02 certificate of appealability (“COA”) should issue. Rule 11(a), Rules Governing Section 2254  
03 Cases in the United States District Courts. A COA may be issued only where a petitioner has  
04 made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(3).  
05 A petitioner satisfies this standard “by demonstrating tha jurists of reason could disagree with  
06 the district court’s resolution of his constitutional claims or that jurists could conclude the  
07 issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v.*  
08 *Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, Mr. Herring should be denied a COA  
09 because no reasonable jurist could disagree with dismissing a case without prejudice where  
10 petitioner fails to respond in any way to court directives aimed toward ensuring that all of  
11 petitioner’s claims are considered and that a proper respondent is named.

12 The Court recommends dismissing Mr. Herring’s habeas petition without prejudice for  
13 failure to comply with two court orders and for failure to prosecute. The Court also  
14 recommends denying a certificate of appealability. The Clerk is directed to send copies of this  
15 Order to petitioner and to the Honorable James L. Robart.

16 DATED this 11th day of March, 2010.

17  
18   
19 Mary Alice Theiler  
United States Magistrate Judge